# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>April 19, 2012 |
| v | No. 303780<br>Berrien Circuit Court |
| DEQUARIUS DEVONTAE STEWART,<br><br>Defendant-Appellant. | LC No. 2010-005053-FC |

Before: BECKERING, P.J., and OWENS and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for first-degree murder, MCL 750.316(1)(b); and assault with intent to rob and steal being armed, MCL 750.89.[1] We affirm.

On October 24, 2010, defendant attacked and killed the victim outside a convenience store. Multiple eye witnesses testified at trial that defendant used a large wrench to repeatedly hit the victim on the head. The store's video system recorded the attack, and the prosecution played the video for the jury.

Defendant first argues that the trial court erred by finding that the prosecution exercised due diligence in producing Nate Williams, an absent res gestae witness, and by refusing to give the jury a missing witness instruction. We disagree.

"We review a trial court's determination of due diligence and the appropriateness of a 'missing witness' instruction for an abuse of discretion." *People v Eccles*, 260 Mich App 379, 389; 677 NW2d 76 (2004). "Reversal for failure to provide a jury instruction is unwarranted unless it appears that it is more probable than not that the error was outcome determinative." *People v McKinney*, 258 Mich App 157, 163; 670 NW2d 254 (2003).

Williams testified at the preliminary examination that he witnessed defendant attack the victim with a wrench. The prosecution endorsed Williams as a witness it intended to produce at

[1] Defendant was also convicted of second-degree murder but that charge was merged with the first-degree murder conviction at sentencing.

trial, but was unable to locate and produce him. Thus, the prosecution had to "show that the witness could not be produced despite the exercise of due diligence." *Eccles*, 260 Mich App at 388. If a trial court "finds a lack of due diligence, the jury should be instructed that it may infer that the missing witness's testimony would have been unfavorable to the prosecution's case" pursuant to CJI2d 5.12. *Id.*

On the first day of trial, Officer Joel Deenik and Detective Wes Smigielski testified regarding the prosecution's efforts to locate and produce Williams. According to this testimony, during the two weeks before trial, law enforcement officers went to Williams' last known place of residence on eight separate occasions and tried to serve Williams a subpoena to appear at trial, but no one ever answered the door. Detective Smigielski also visited Williams' brother and obtained a telephone number for Williams, but Williams never answered Smigielski's telephone calls. Detective Smigielski also contacted Williams' sister and instructed her to tell Williams to call him, but Williams never contacted Smigielski. This evidence supported the trial court's finding that the prosecution exercised due diligence. *People v Long*, 246 Mich App 582, 586; 633 NW2d 843 (2001) (holding that the trial court did not abuse its discretion in finding due diligence where the police officer went to the witness' last known address, but she did not answer; went to the witness' last known place of employment, but she no longer worked there; attempted to contact the witness, but she did not respond; and left messages for the witness that she did not return); *People v Snider*, 239 Mich App 393, 422-423; 608 NW2d 502 (2000) (holding that the trial court did not abuse its discretion in finding due diligence where the prosecution conducted a background check and contacted two of the witness' relatives regarding his whereabouts).

Defendant, relying on *People v Dye*, 431 Mich 58; 427 NW2d 501 (1988), argues that the prosecution lacked due diligence because it did not attempt to locate Williams until two weeks before the trial. In *Dye*, our Supreme Court found that the prosecution lacked due diligence, as its efforts to locate three crucial witnesses were "tardy and incomplete." *Id*. at 67-68. In *Dye*, although the prosecution knew for months that the witnesses intended to leave the state and avoid service, the prosecution did not investigate the witnesses' whereabouts until the weeks immediately before the trial and neglected to pursue multiple specific leads regarding the witnesses' whereabouts. *Id*. at 67-72. In contrast, the record in the present case is unclear as to when the prosecution learned of Williams' arrest warrants and his motive to avoid service, and there was no evidence that the prosecution neglected any specific leads regarding Williams' whereabouts. Accordingly, on the record before this Court, we find that defendant fails to show that the trial court abused its discretion by finding that the prosecution exercised due diligence and, thus, refusing to give a missing witness instruction. *Eccles*, 260 Mich App at 389.

Defendant also asserts that his trial counsel was ineffective for failing to request a due diligence hearing, failing to demand that the prosecution assist in locating Williams, and failing to object to the omission of the missing witness instruction. Defendant did not properly present these ineffective assistance of counsel claims because he failed to raise them in his statement of the questions presented. *People v Unger*, 278 Mich App 210, 262; 749 NW2d 272 (2008). Moreover, we find these claims to be without merit, particularly where the trial court heard evidence on the efforts to locate Williams and where counsel asked for a missing witness instruction.

Defendant next argues that the prosecutor denied him a fair trial by committing prosecutorial misconduct and that his trial counsel was ineffective for failing to object to this misconduct. We disagree.

"Defendant did not object to the prosecutor's comments during trial; thus, his argument on appeal is not preserved." *People v Parker*, 288 Mich App 500, 509; 795 NW2d 596 (2010). "A defendant pressing an unpreserved claim of error must show a plain error that affected substantial rights, and the reviewing court should reverse only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Id*. Defendant also did not preserve his ineffective assistance claim because he did not move for a new trial and the trial court did not hold a *Ginther*[2] hearing. *People v Musser*, 259 Mich App 215, 220-221; 673 NW2d 800 (2003). Our review of defendant's unpreserved ineffective assistance of counsel claim "is limited to mistakes apparent on the record." *People v Petri*, 279 Mich App 407, 410; 760 NW2d 882 (2008).

In his closing argument, the prosecutor stated:

> I've been doing this for over 20 years. Tried many of these cases. This is the first case that I ever had (inaudible; microphone cuts out) actual murder. (Inaudible; microphone cuts out) that evidence of an actual homicide in all of Berrien County.

"The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial." *People v Mesik (On Reconsideration)*, 285 Mich App 535, 541; 775 NW2d 857 (2009). "Prosecutors are typically afforded great latitude regarding their arguments and conduct at trial. They are generally free to argue the evidence and all reasonable inferences from the evidence as it relates to their theory of the case." *Unger*, 278 Mich App at 236 (citations omitted). However, "prosecutors should not . . . express their personal opinion of a defendant's guilt" or use "the prestige of the prosecutor's office to inject personal opinion . . . ." *People v Bahoda*, 448 Mich 261, 282-283, 286; 531 NW2d 659 (1995). It appears that the prosecutor improperly used "the prestige of the prosecutor's office to inject" his personal opinion regarding defendant's guilt where he referenced his experience in vouching for the credibility of the case. *Id*.

However, we find that any such error does not warrant reversal because defendant has not shown that the error affected his substantial rights. *Parker*, 288 Mich App at 509, citing *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). This "requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings." *Carines*, 460 Mich at 763. Here, as discussed above, the prosecution presented ample evidence of defendant's guilt. Thus, defendant fails to show that the prosecutor's closing argument affected the outcome of his trial. *Id*.; *Bahoda*, 448 Mich at 287. Moreover, we will not reverse where, as here, the circumstances indicate that "a curative instruction could have alleviated any prejudicial effect, given that jurors are presumed to follow their instructions." *People v Likine*, 288 Mich App 648, 659; 794 NW2d 85 (2010). Moreover, although defendant did not request or receive a curative

[2] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

instruction, the trial court instructed the jury not to consider the prosecutor's statements as evidence. Such a jury instruction "was sufficient to cure any prejudice. Therefore, this issue does not warrant reversal." *Long*, 246 Mich App at 588; see also *People v Callon*, 256 Mich App 312, 330-331; 662 NW2d 501 (2003).

Defendant raises a concomitant argument that his trial counsel was ineffective for failing to object to the prosecutor's closing argument and request a curative instruction. "The right to counsel guaranteed by the United States and Michigan Constitutions is the right to effective assistance of counsel." *In re CR*, 250 Mich App 185, 197; 646 NW2d 506 (2001) (quotation and citation omitted). "[T]his Court presumes that a defendant received effective assistance of counsel, and the defendant bears a heavy burden to prove otherwise." *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001). "To establish ineffective assistance of counsel, the defendant must first show: (1) that counsel's performance fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *People v Yost*, 278 Mich App 341, 387; 749 NW2d 753 (2008).

"[D]eclining to raise objections, especially during closing arguments, can often be consistent with sound trial strategy." *Unger*, 278 Mich App at 242. Moreover, we give defense counsel "wide discretion in matters of trial strategy." *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). We have held that "there are times when it is better not to object and draw attention to an improper comment." *Bahoda*, 448 Mich at 287 n 54; *Unger*, 278 Mich App at 242. In this case, we find that defendant has not "overcome the strong presumption that his counsel's action constituted sound trial strategy under the circumstances." *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). Moreover, even if counsel's performance was deficient, defendant cannot establish that this error affected the outcome of his trial. *Yost*, 278 Mich App at 387. In light of the overwhelming evidence against defendant and the instructions that the trial court gave the jury, defendant fails to show that counsel's failure to object and request a curative instruction affected the outcome of his trial. *Id*.; *Mesik (On Reconsideration)*, 285 Mich App at 543 (holding that the defendant's ineffective assistance of counsel claim "fails because defendant has not established that there is a reasonable probability that the result of the proceedings would have been different had his counsel objected" to the prosecutor's closing argument).

Affirmed.

/s/ Jane M. Beckering
/s/ Donald S. Owens
/s/ Amy Ronayne Krause